Supreme Court, U.S.
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No. 91-1869

In The

Supreme Court of the United States

October Term, 1992

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTICS CO., INC., AND MICHAEL J. LADNEY,

Petitioners,

v.

UNITED STATES OF AMERICA; Frank J. Kelley, Attorney General for the STATE OF MICHIGAN, ex rel; Michigan Department of Natural Resources Commission; Gordon E. Guyer, Director of the Michigan Department of Natural Resources,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER MICHAEL LADNEY

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Both Respondent State of Michigan (State Br. at 7) and Respondent United States of America (U.S. Br. at 4) flatly accuse Production Plated Plastics ("PPP") of operating a hazardous waste facility in violation of the Resource Conservation and Recovery Act, 42 USC § 6901, *et seq.* for two years after PPP lost "interim status" in November of 1985 until December of 1987.

While this accusation is technically accurate it fails to offer the Court the whole story. Both Respondents conspicuously fail to note that each acquiesced to PPP's use of its surface impoundments (RCRA facilities) during this two year period despite the facial violation of RCRA. Why would the Environmental Protection Agency ("USEPA") and Michigan Department of Natural Resources ("MDNR") acquiesce to a technical RCRA violation? The answer is simple and compelling. The well-being of the environment and the community necessitated such acquiescence.

During this two year period a sewer construction project was underway, with sewer hook-up achieved in December of 1987. PPP's only options during this period were to use the impoundments or to close, which would have meant the loss of 400 manufacturing jobs and the demise of Richland, Michigan's largest taxpayer and employer. Furthermore, the closing of the plant would have eliminated the financial underpinnings of the sewer extension project and, therefore, would have destroyed

the groundwater remediation system at the plant, a system that had to be shut down during this time pending the extension of the sewer line.

In fact, it is undisputed that in 1986, in the middle of this two year period, Governor James Blanchard of the State of Michigan paid a special visit to the plant to commend PPP for its commitment to the environment and to maintaining Michigan manufacturing jobs. Moreover, it is undisputed that the United States Environmental Protection Agency in its October 17, 1985 letter rejecting the Company's Part B RCRA Application blessed the continued temporary use of the PPP surface impoundments until sewer hook-up could be achieved:

> "As you know, we [USEPA] recommend that you close the waste pile and surface impoundments in lieu of pursuing a permit. *We are aware that the feasibility of such closure depends upon your ability to obtain an NPDES discharge permit or a local sewer system connection for the plating system waste water . . .* "

(Emphasis Added).

While these facts may be incidental to the issue of personal liability, Petitioner Michael Ladney believes that it is important for this Court to understand that he is not a callous RCRA violator but instead is a responsible industrialist concerned about preserving jobs and cleaning up the environment, exactly the type of individual who is critical to our economic revival and environmental regeneration.

ARGUMENT

I

THE PERSONAL LIABILITY OF THE PETITIONER MICHAEL LADNEY IS RIPE FOR REVIEW

Respondent United States argues that the personal liability of Petitioner Michael Ladney is not ripe for review because it was not challenged in the district court and because the Sixth Circuit refused to entertain the issue. The Respondent is wrong in fact and law.

Petitioner Ladney denied that he was personally liable as a RCRA owner or operator in his Answer to the Complaint (J.A. p. 120, ¶9), as well as in his Responses to the Respondents' Motion for summary disposition on liability (See R73, R79).

It is true that the Petitioner's arguments on his lack of RCRA liability were not fully developed in the twenty-eight days in which he had to respond to the summary disposition motion under W.D. Michigan Local Rule 29(c). However, the fact that full argument on an issue may not have been made in district court does not bar Supreme Court consideration of that issue. *Delloiti v. Baird,* 428 U.S. 132 (1976). Accordingly, whether Mr. Ladney is personally liable under RCRA is an issue adequately raised and litigated in the district court.

In any event, the Sixth Circuit Court of Appeals reviews the issuance of summary judgment, as was involved herein, on a *de novo* basis. *Storer Communications, Inc. v National Association of Broadcast Employees,* 854 F. 2d 144, 146 (6th Cir 1988). This rule makes sense given the

truncated time (28 days) in which a party opposing summary judgment must present countervailing facts and argument. Thus, even if one considers the issue of whether Mr. Ladney was personally liable under RCRA to be an issue first raised before the Sixth Circuit, which it clearly was not, the Sixth Circuit properly considered the issue despite erroneously deciding the question.[1] Under any view, Petitioner's liability is ripe for review by this Court.

II

THE RESPONDENTS' ARGUMENT IN FAVOR OF PERSONAL LIABILITY IN A CORPORATE SETTING IS FATALLY FLAWED BECAUSE IT CANNOT DISTINGUISH BETWEEN CORPORATE AND INDIVIDUAL ACTS

There is no better justification for a granting of the Petition in the present case than the muddled logic contained in the USEPA's Brief in Opposition. On page 7 of its brief, the USEPA argues that the district court's finding that Mr. Ladney was a statutory "operator" of the PPP plant is consistent with common law because of the "universal rule that an officer of a corporation who takes

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[1] The USEPA's suggestion that the Sixth Circuit refused to consider the issue is simply false. Discussion at oral argument was almost entirely focused on this issue and the Sixth Circuit expressly affirmed the liability finding against Mr. Ladney. The USEPA merely seeks to take advantage of the fact that the Sixth Circuit Court's affirmation in its per curiam decision contained no analysis. Mr. Ladney has become painfully aware that an absence of analysis is *not* tantamount or equivalent to the absence of a substantive decision.

part in the commission of a tort by the corporation is personally liable therefor" and because "no common law principles are offended when, as here, an individual corporate officer is held responsible for his own conduct."

The Respondent cites no support for its adventurous conclusion that the violation of a no fault regulatory statute like RCRA is a tort. Overlooking for the moment this glaring deficiency, a compelling question nevertheless emerges: What tortious acts did Mr. Ladney commit?

The USEPA attempts to answer this question on page 13 of its brief with the following four undisputed facts:

(1) Mr. Ladney was the president of PPP (as well as 10 other manufacturing companies).

(2) He was the person listed on the facility's 1980 Part A RCRA Application as "owner and operator" although this status was corrected before any RCRA violations occurred.

(3) He attested in an affidavit to knowledge about environmental compliance in a state case that the Respondents maintain is irrelevant to this RCRA case.

(4) He was a hands-on corporate president who kept in close contact with PPP's operations by regular telephone contact with the plant manager.

For the United States government to suggest that being president of a corporation, signing federal forms, having some knowledge of a related clean-up matter and telephoning the plant manager to discuss general business subjects is tortious behavior would be humorous if

its implications on our system of commerce and capital investment were not so potentially deleterious.

The unvarnished reality is that the district court found Mr. Ladney liable merely because of his status as the president of a corporation that violated RCRA, rather than because of any individual acts which he committed. See portion of district court opinion on page A-14 of Petitioners Brief. The USEPA knows it cannot defend the district court's operative holding in this case because it is unprecedented under common law, unparalleled in any other statutory context and because it is wholly unprincipled.

Perhaps the best way to expose the unprincipled nature of the governments' reasoning would be to ask the USEPA or State of Michigan which corporate officials or employees would not be liable as RCRA "tortfeasors" in the present case. Are PPP's corporate directors, vice-presidents, in-house legal counsel, plant manager, environmental specialist, and waste water treatment workers also liable as "operators" under RCRA?[2] The only answer that USEPA or the MDNR can give this Court if presented with this question on certiorari, is that any or all of such personnel would have been liable if they had chosen to sue them. For the reasons more thoroughly detailed in the Petition for Writ of Certiorari, the governments' alarming, unprincipled interpretation of congressional intent in RCRA must be rejected, since Congress clearly knows how to qualify the terms "person" or "operator" when it

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[2] Many of these corporate actors were far more active in the decisions leading to the RCRA violations that Mr. Ladney, who was president of eleven (11) manufacturing companies.

intends personal employee liability in a corporate/environmental context.[3]

The simple truth in this case is that no act of Mr. Ladney was tortious, and no straining of the facts can remotely justify a conclusion that Mr. Ladney was acting in a personal, rather than corporate capacity. The USEPA's suggestion that Michael Ladney is liable because he acted individually not corporately lacks any pedagogy because it blurs all distinctions between individual and corporate acts. The USEPA's position also essentially begs the question of whether Congress intended corporate actors to be individually and personally liable for the Company's no-fault RCRA violations.

CONCLUSION

The personal liability in this case of an officer for corporate RCRA violations is ripe and compelling for review. A Writ of Certiorari should be issued.

Respectfully submitted,

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[3] See the Clean Water Act, 33 USC § 1348(4)(B) and the Clean Air Act, 42 USC § 7413(h) which qualify these terms and provide standards for personal liability in a corporate setting *but only under limited circumstances.*